

2006

Shirley Ottman v. Kenneth Baldwin and Collette Baldwin : Response to Petition for Rehearing

Utah Court of Appeals

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Unknown.

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Attorneys for Appellees

IN THE UTAH COURT OF APPEALS

SHIRLEY OTTMAN,

Plaintiff-Appellant,

vs.

KENNETH BALDWIN and
COLLETTE BALDWIN,

Defendant-Appellees.

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OPPOSITION TO PETITION FOR
REHEARING

Case No. 20060209

COMES NOW Defendants/Appellees, Kenneth Baldwin and Collette Baldwin,
by and through their attorneys of record, Crippen & Cline, and pursuant to Rule 35 of the
Utah Rules of Appellate Procedure, do hereby oppose Plaintiff/Appellant's petition to
the Court for rehearing of this matter. In opposition to that petition,

Defendants/Appellees respond as follows:

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In this case, the trial court affirmed the metes and bounds eastern boundary of Lot 5 of the Redbirch Estates Subdivision ("Lot 5"), which runs in a straight line from the northeast corner of Lot 5 to the southeast corner of Lot 5. The metes and bounds eastern boundary of the Farmbrook Estates Subdivision ("Farmbrook Estate"), the adjacent subdivision to the south of Lot 5, continues on the same straight line as the eastern boundary of Lot 5.

Had Ms. Ottman prevailed at trial, the eastern boundary of Lot 5 would have veered to the west starting close to the point where the Pardoe Property intersects with the eastern boundary of Lot 5 (which is the southwest corner of the Pardoe Property) and then followed the line marked by a length of chainlink fence Kenneth Howcroft constructed in 1994 to a point near the north end of the fence on Farmbrook Estates on the south (approximately 7 feet west of the metes and bounds southeast corner of Lot 5.) From that point, the boundary line for Lot 5 would have jogged east back to the metes and bounds southeast corner of Lot 5 (which is the same as the metes and bounds northeast corner of Farmbrook Estates), and then turned south along the metes and bounds eastern boundary of the Farmbrook Estates Subdivision.

Ms. Ottman's Petition for Rehearing is based on the misrepresentation that the northeast corner of Farmbrook Estates is the same as the north end of the fence line on

Farmbrook Estates. Ms. Ottman also misrepresents that Farmbrook Estates fence runs along the metes and bounds eastern boundary of Farmbrook Estates. Neither of these is true. As demonstrated by every survey and every witness to testify on the subject, the fence on Farmbrook Estates runs west of the metes and bounds eastern boundary of Farmbrook Estates. The north end of that fence is west of the northeast corner of Farmbrook Estates.

I. THE METES AND BOUNDS EASTERN BOUNDARY LINES FOR BOTH SUBDIVISIONS ARE ON THE SAME STRAIGHT LINE.

As discussed in Appellee's Brief, both surveyors agreed as to the location of the metes and bounds eastern boundary of Lot 5. See Appellee's Brief, pg 13-14. Furthermore, both surveyors agreed that the eastern boundary for Farmbrook Estates is on the same line as the eastern boundary for Lot 5.

Each of the four exhibits consisting of Robert Jones' surveys show the eastern boundary of Lot 5 and the eastern boundary of Farmbrook Estates as a single straight line. See Plaintiff's Exhibits 1, 6 and 9 and Defendant's Exhibit B, attached as Addendums A, B, C and D hereto, respectively. Each of those surveys demonstrate no change in angle as one goes from the eastern boundary of Lot 5 to the eastern boundary of Farmbrook Estates.

The Lot 5 plat also demonstrates no change in angle as one goes from the eastern metes and bounds boundary of Lot 5 to the eastern metes and bounds boundary of the Farmbrook Estates. See Plaintiff's Exhibits 4 and 5, attached as Addendums E and F hereto, respectively. On Defendant's Exhibit L David Peterson juxtaposed his survey work and Robert Jones' survey work. See Addendum G. Defendant's Exhibit L also shows the eastern boundary of Lot 5 and the eastern boundary of Farmbrook Estates as running along the same straight line. David Peterson also testified that the eastern metes and bounds boundary of Lot 5 and Farmbrook Estates are "the same" and are a "straight line:"

Q - Okay , the southeast corner for the Baldwin property, okay, how does that relate to the property south, the Farmbrooks, Farmbrook Estates' property?

A - Oh they met. In fact they line up with adjoining subdivisions.

Q - So is the eastern boundary of the Redbirch Estates Subdivision the same as the eastern boundary, consistent with the eastern boundary of the Farmbrook Estates Property?

A - Yes.

Q - That's a straight line, is it not?

A - They should be, yeah, I think so.

R. 820, p. 290:16-291:6.

II. THE FARMBROOK ESTATES' FENCE IS WEST OF THE METES AND BOUNDS EASTERN BOUNDARY LINE FOR FARMBROOK ESTATES.

The existing fence on Farmbrook Estates is located west of the metes and bounds eastern boundary line for Farmbrook Estates and ends (on the north) west of the northeast corner of Farmbrook Estates. Dave Peterson testified that the "blue old wire fence line" shown on Exhibit L was close to the location of the fence on Farmbrook Estates and the "green line" on Exhibit L represented the metes and bounds eastern boundary line for the Farmbrook Estates:

Q - Now where on your Exhibit L have you notated or made any reference to that wooden fence there at Farmbrook?

A - I didn't actually show it on that survey.

Q - Okay, but if you were to tell us where it is, where would it be on this line? Would it...follow the blue old wire fence line? Approximately? Surveyed by Bob Jones?

A - Possibly would. I believe they backed off their line, yeah.

Q - Okay, so it's, it's approximately where that old wire fence blue line is there for the Bob Jones' survey, isn't it....

...

Q - So your, your only means of placing the Farmbrook Estates is based on the deeds and the count, mathematical

calculations, which gives you the green line, right?

A - Right.

R. 820, pp 307-309. (Emphasis added.)

It is not difficult to see that the "blue line" on Exhibit L (the approximate location of the Farmbrook Estates fence line) and "green line" on Exhibit L (the metes and bounds eastern boundary line for Farmbrook Estates) are not the same line. The "blue line" is west of the "green line." See Addendum G.

The fence on Farmbrook Estates is also shown on Plaintiff's Exhibit 6 (marked "old fence"), Plaintiff's Exhibit 9 (marked "old fence line per 1973 survey by Bush and Gudgell") and Defendant's Exhibit B (marked "old fence."). See Addendums B, C and D, respectively. On each of those surveys by Robert Jones, the Farmbrook Estates fence is located west of the boundary line for Farmbrook Estates.

Plaintiff's Exhibit 4, which is the Red Birch Estates Subdivision plat, also shows the location of the Farmbrook Estates fence as west of the eastern boundary of Farmbrook Estates. On that exhibit, part of the fence was drawn in by hand and is located west of the eastern boundary of Farmbrook Estates. See Addendum E.

Kenneth Howcroft and Kenneth Baldwin also both testified as to the "gap" between the south end of the length of chain link fence on Lot 5 and the southeast corner

of Lot 5. Kenneth Howcroft testified that "the gap between the fence line and the boundary line [at its] widest" point was "about seven feet." R. 819, pg. 80. Kenneth Baldwin testified that the chain link fence was "very close to seven feet" "west of [his] metes and bounds boundary line at its widest point." R. 819, pg. 123. Because the south end of the length of chain link fence was in the same location as the north end of Farmbrook Estates fence, the north end of the fence on Farmbrook Estates fence would have also been "close to seven feet" west of the northeast corner of Farmbrook Estates.

III. MS. OTTMAN HAS MISREPRESENTED THE LOCATION OF THE
FARMBROOK ESTATES METES AND BOUNDS EASTERN BOUNDARY
IN RELATIONSHIP TO THE FARMBROOK ESTATES FENCE.

In her Petition for Rehearing, Ms. Ottman repeatedly misrepresented that Farmbrook Estates fence and the metes and bounds eastern boundary of Farmbrook Estates are in the same location.

A. Ms. Ottman Changed Plaintiff's Exhibit 5 to Make the Farmbrooks Estates Fence Line and Eastern Boundary Line to Appear the Same.

In her Petition for Rehearing, Ottman referred to plaintiff's Exhibit 5, which she attached as "Exhibit 2" to her Petition for Rehearing. That exhibit is part of the subdivision plat for Lot 5. Ms. Ottman handwrote point "A" and point "B" on that exhibit, and represented that "the boundary should run through point A and point B."

See Petition for Rehearing, pg 5. Point A is the southwest corner of the Pardoe Property, and Point B is the southeast corner of Lot 5 (and also the northeast corner of Farmbrook Estates.) In fact, the eastern boundary for Lot 5 does run "through point A and point B." The trial court ruled that "[t]itle is quieted in defendants to Lot 5 of the Red Birch Estates Subdivision up to the bearing and distance description in the subdivision plat." See R. 708 (Findings of Fact and Conclusions of Law.)

However, Ms. Ottman wrote in the words "wooden fence" below point "B" on the copy of plaintiff's Exhibit 5 attached to Ottman's Petition for Rehearing as Exhibit 2 to make it appear that the Farmbrook Estates fence and northeast corner of Farmbrook Estates were in the same location. The words "wooden fence" do not appear on the original plaintiff's Exhibit 5 introduced at trial. See Addendum F hereto. Ms. Ottman changed Plaintiff's Exhibit 5 to try to trick this Court into believing that the Farmbrook fence is located on the same line as "point B," which is not true. Addendum F is Plaintiff's Exhibit 5, as introduced at trial, which does not have the words "wooden fence" written on the exhibit.

Ms. Ottman also failed to disclose to the court Plaintiff's Exhibit 4, which is the same as Plaintiff's Exhibit 5, but has part of the fence drawn in. The location of the wooden fence as drawn on Plaintiff's Exhibit 4 is not where Ms. Ottman represented on

her "Exhibit 2." Addendum E is Plaintiff's Exhibit 4, which shows the location of the fence as it was drawn in trial. The part of the fence on Farmbrook Estates was drawn west of the eastern boundary line of Farmbrook Estates.

B. The Trial Court's Ruling Does Not Create A "Jog" in the Boundary Line.

Ms. Ottman next argues that the trial court's ruling will create a "jog" in the boundary line along the eastern boundary of Lot 5 and Farmbrook Estates. Petition for Rehearing, pg. 6-7. In fact, the trial court's ruling does not create a "jog." To the contrary, the trial court's ruling means that the eastern boundary line for Lot 5 and Farmbrook Estates remain along the same straight line. David Peterson testified that a "jog" in the boundary would have been created had the trial court ruled in Ms. Ottman's favor:

Q - So if you were to move the boundary from that southeast corner, if you were to move it west either 3.5 feet, 4.9 feet, 6.24 feet, depending on where you decided that fence might have been, would that create a jog in the boundary?

A - Yes, it would, and the county wouldn't, wouldn't allow it anyway...

...

Q - [I]f for some reason this Court ruled that there should be, that that east, southeast corner of the Baldwin property should be moved west, either 3.5 feet, 4.9 feet, 6.24 feet, depending

on where, where that fence line might have once been, is that going to create a jog in the, in the boundary line?

A - Yes, it will.

Q - Because the, the boundary line south [i.e., the Farmbrook Estates boundary line] lines up with the boundary line that you have right now?

A - Right.

R. 820, pg. 291-292.

To "prove" that the trial court's ruling will create a "jog" in the boundary, Ms. Ottman attached a picture to her Petition for Rehearing that demonstrates that the wall being constructed on Lot 5's eastern boundary line will not connect with the Farmbrook Estates fence. See Petition for Rehearing, Exhibit 3. Ottman states that "[l]ooking at picture...it is clear to see that the wall the Defendants are constructing will overshoot the eastern boundary of the Farmbrook Estates by several feet to the east, creating a jog in the boundary line." Petition for Rehearing, pg. 6. (Emphasis added.) As previously discussed, the Farmbrook Estates fence depicted on "Exhibit 3" does not mark "the eastern boundary" of Farmbrook Estates. Therefore, the fact that the Baldwin wall (which is on the eastern boundary of Lot 5) does not connect with the Farmbrook Estates fence does not mean there will be a "jog in the boundary line." To the contrary, the

Farmbrook Estates eastern boundary line continues in a straight line south of that wall.

C. Ms. Ottman Misrepresents Dave Peterson's Testimony.

Finally, in her Petition for Rehearing, Ms. Ottman claims that David Peterson "affirmed that [the eastern boundary of the Farmbrook Estates Subdivision] would be on or near the line indicated by the inscription, "Old Wire Fence (surveyed by Bob Jones.)" Petition, pg 7. In fact, Peterson made no such representation. As previously discussed, the "Old Wire Fence (surveyed by Robert Jones)" as shown on Defendant's Exhibit L, is west of the eastern boundary line of Farmbrook Estates. See Addendum G hereto. The "old fence line" as shown on all four exhibits consisting of Bob Jones' surveys was always west of the eastern boundary line of Farmbrook Estates. See Addendums A, B, C and D hereto.

IV. ATTORNEY'S FEES SHOULD BE AWARDED

Attorney's fees should be awarded pursuant to Rule 33 of the Utah Rules of Appellant Procedure inasmuch as the Petition for Rehearing was "not grounded in fact." Specifically, Ottman changed an exhibit and misrepresented testimony to try to prove a fact that does not exist, to wit: that the eastern metes and bounds boundary of Farmbrook Estates and the fence on Farmbrook Estates are in the same location. Every survey and every witness to testify on this issue indicated otherwise.

CONCLUSION

The trial court correctly affirmed the platted eastern boundary of Lot 5. Ms. Ottman has raised no issue that would justify a rehearing in this matter. For the foregoing reasons, Ottman's Petition for Rehearing should be denied and attorney's fees awarded.

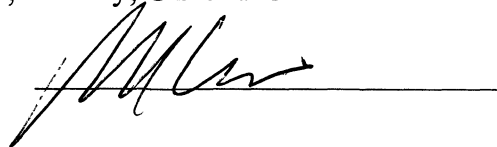
DATED this 16 day of July, 2007.



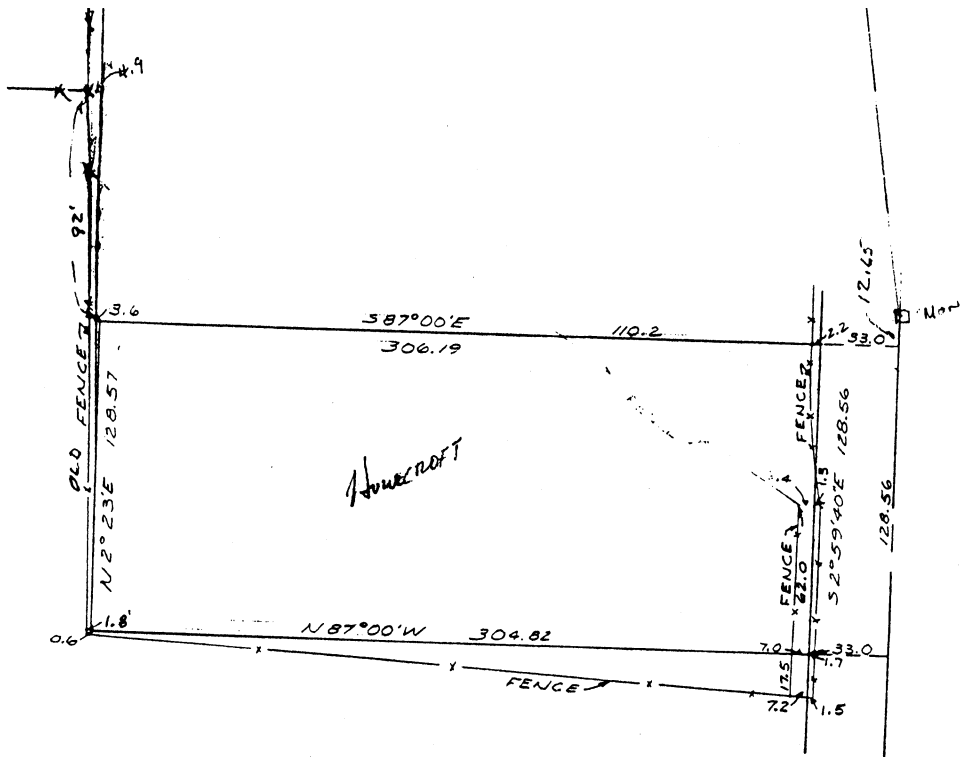
RUSSELL A. CLINE, Attorney for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16 day of July, 2007, I caused to be delivered via first class mail, postage pre-paid, the foregoing to Steven C. Tycksen, Zoll & Tycksen, LC, 5300 South 360 West, Suite 360, Murray, UT 84123.



ADDENDUM A



SCALE

1" = 60'



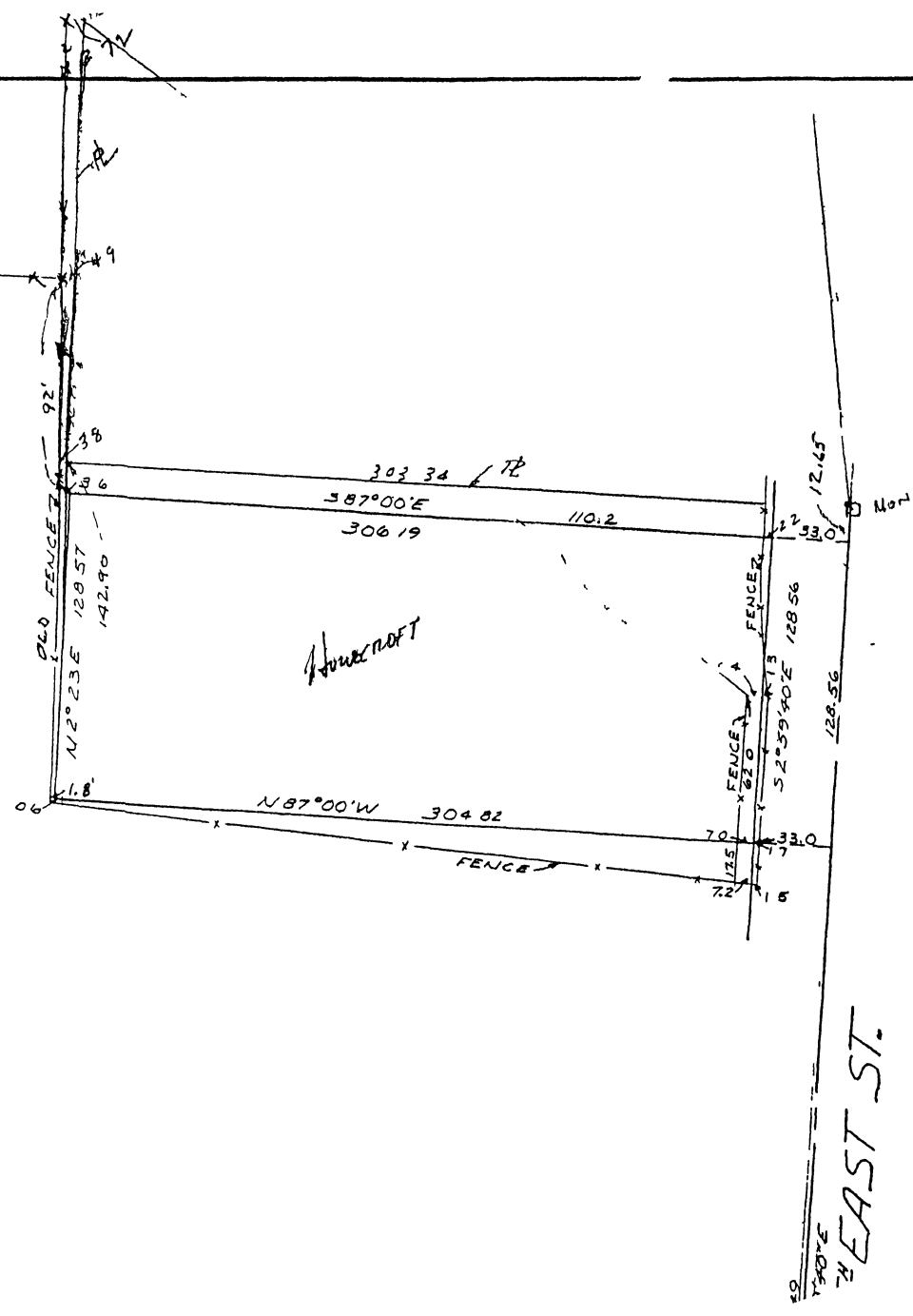
LITTLE COTTONWOOD

20TH EAST ST.

N 2° 59' 40" E 1192.49

N 54° 15' 20" W 539.29

ADDENDUM B



SCALE

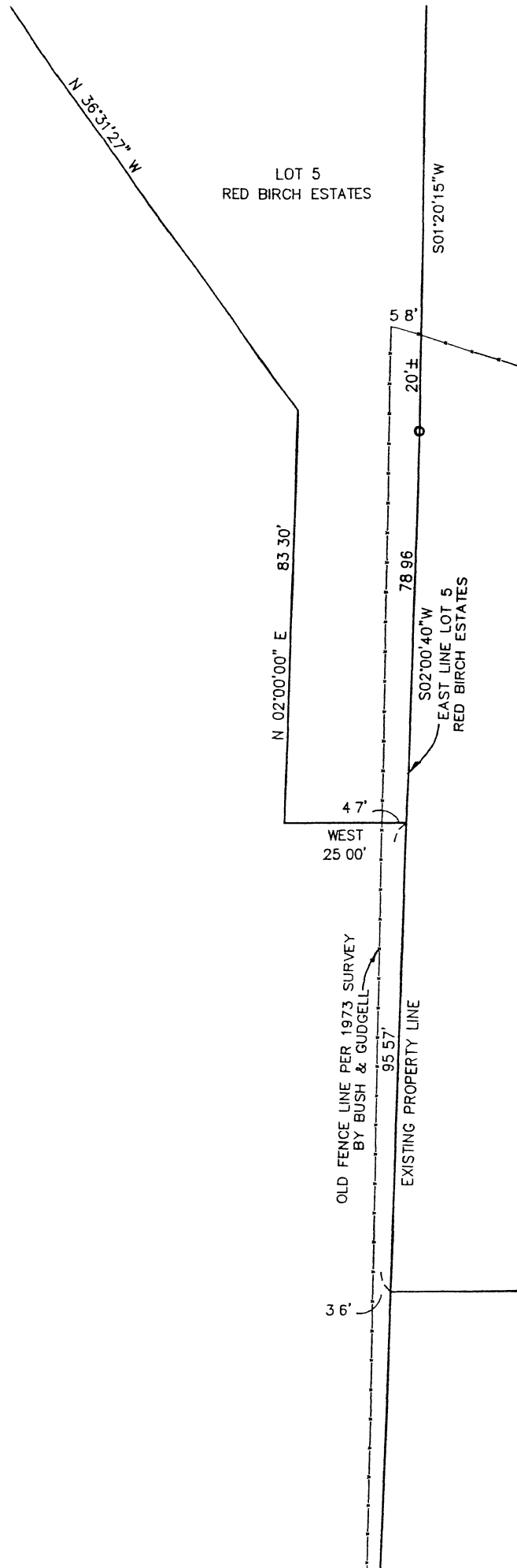
1" = 60'

that the following...

Beginning at a point in the west quarter corner of Sec. 12b. thence North $2^{\circ} 59' 40''$ East 337.82 feet; thence South 87° East 337.82 feet; I further certify that the visible improvements shown on this plat.

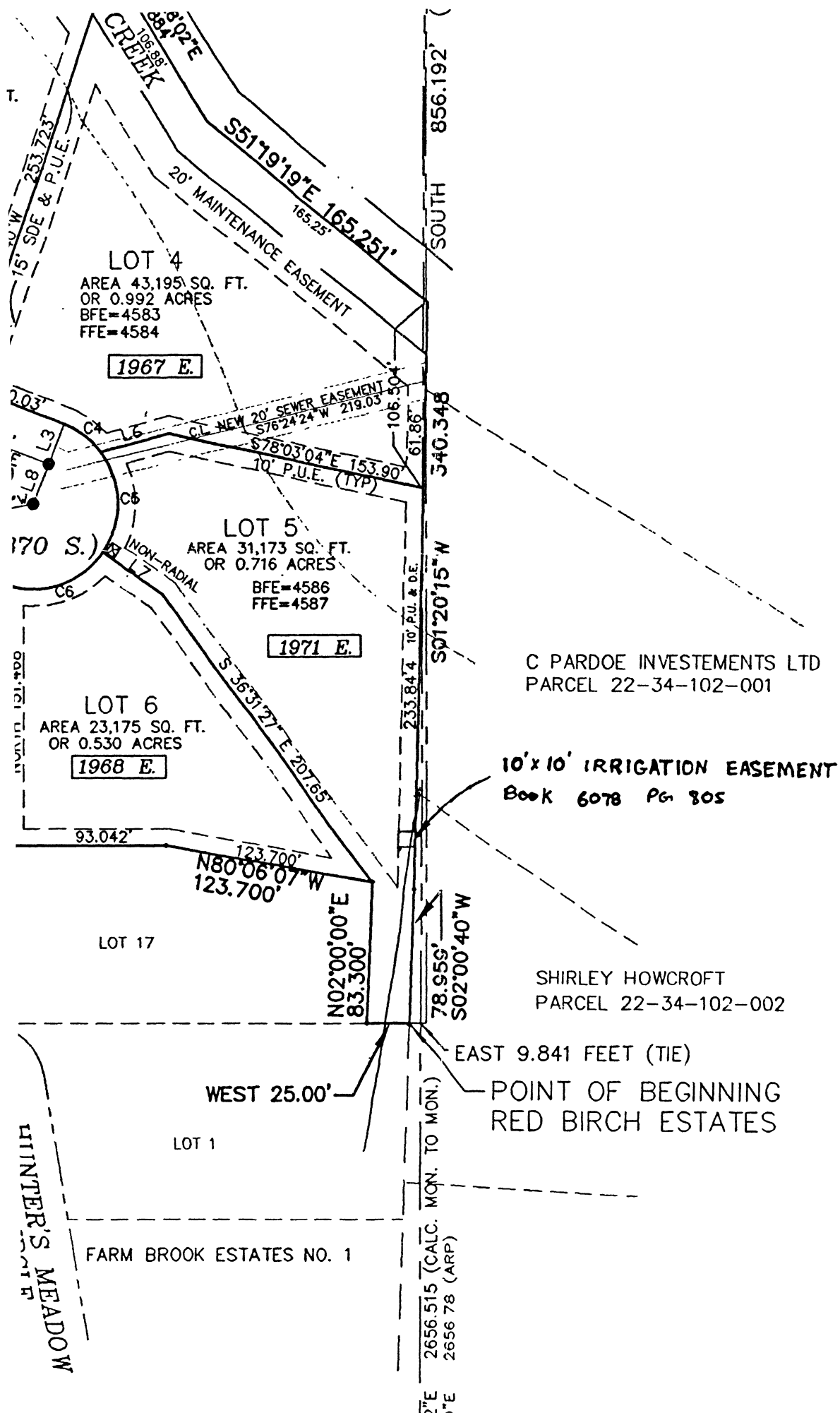
ADDENDUM C

ADDENDUM D



SHIRLEY HOWCROFT

ADDENDUM E



ADDENDUM F

ADDENDUM G

